UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

COLUMBUS TRANSIT, LLC,

and

TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100, AFL-CIO,

Case #s: 2-CA-39193 and 2-RC-23351

and

LOCAL 713, INTERNATIONAL BROTHERHOOD OF TRADE UNIONS, IUJAT

TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100'S BRIEF IN OPPOSITION TO EXCEPITONS

Polly J. Halfkenny
Jason R. Veny
Attorneys for TWU Local 100
1700 Broadway, 2nd Floor
New York, New York 10019
(212) 873-6000 ext. 2010

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STATEMENT OF THE CASE

The Petitioner, the Transport Workers Union of Greater New York, Local 100, ("TWU Local 100" or "Petitioner") hereby files this Answering Brief in Opposition to both Columbus Transit, LLC's ("Employer") and Local 713, International Brotherhood of Trade Unions, IUJAT's ("Local 713") Exceptions to Administrative Law Judge Raymond P. Green's ("ALJ") decision in the above-referenced matter issued on October 4, 2010. TWU Local 100 does not concede or agree to the validity or applicability of any of the statements or arguments made by Employer or Local 713 in its Exceptions, including those not specifically answered or referred to herein.

PROCEDURAL HISTORY

On or about November 10, 2008, the Employer and Local 713 entered into a recognition agreement whereby they agreed that Local 713 represented a majority of the members of the bargaining unit and that the Employer recognized Local 713 as the exclusive bargaining representative of its drivers. (ALJD at. 2, Lns. 46-48)[1]. The Employer so notified the Region, which sent an official NLRB notice to the Employer, and the 45-day posting period began on November 17, 2008. (*See* Stipulation 1 and G.C. Ex.1-c).[2]

On December 22, 2008, TWU Local 100 timely filed the instant petition in Case 2-RC-23351 and an unfair labor practice charge in Case No. 2-CA-39089, alleging in relevant part that the Employer unlawfully recognized Local 713 as the exclusive collective bargaining representative of its drivers at a time when it did not represent an

[1] ALJD followed by a page and line number refers to the page and line number in the Decision of the ALJ.
[2] G.C. Ex. Followed by a number refers to the exhibits introduced by the General Counsel at the hearing on August 24, 2010.

uncoerced majority and before the Employer hired a representative complement of employees. (ALJD at 3, Lns. 2-4, 19-21; G.C. Ex. 1-a).

The Regional Director issued her Decision and Direction of Election ("D&DE") in this matter on February 5, 2009. (ALJD at. 28-30; G.C. Ex 1-c). On February 26, 2009, the Employer filed a Request for Review of the D&DE. (G.C. Ex. 1-e). Pursuant to the D&DE, the Board conducted a secret ballot election on March 6, 2009. (ALJD at 3, Lns. 39-40; G.C. Ex. 1-c). The ballots were impounded pending the action on the Employer's Request for Review of the D&DE. (ALJD at 3, Lns. 39-40; G.C. Ex. 1-e).

When the Board had not issued a decision on the D&DE by March 12, 2009, TWU Local 100, in order to assure a prompt determination of the employees' wishes concerning representation, requested withdrawal of its unfair labor practice charges, including its allegations that the Employer violated § 8(a)(2) by prematurely recognizing and improperly assisting Local 713. This request was approved by the Region on March 16, 2009. (G.C. Ex. 1-i).

On March 20, 2009 the Acting Regional Director issued a Supplemental Decision and Order ("Supplemental Decision") noting, *inter alia*, that

- the "withdrawal of the Section 8(a)(2) charge removes any of the questions raised by the petition in the context of a potential taint from conduct unlawful under Section 8(a)(2) of the Act;" that
- "the discussion regarding the need for certification to be held in abeyance pending completion of the unfair labor practice proceeding should Intervenor win the election, is now moot;" and that
- "the facts and circumstances now did not exist at the time of the issuance of the decision;"

and therefore deciding that

- " the order that only a conditional certification would issue in the event the employees were to vote for Local 713 is hereby withdrawn;"

and ordering that

- "the ballots be opened at an appropriate time and counted and that thereafter the appropriate certification shall be issued." Supplemental Decision at 2-3.

(ALJD at 3, Lns. 42-44; G.C. Ex. 1-i at 2-3). Subsequently, Employer filed a request for review of the Acting Regional Director's Supplemental Decision on April 2, 2009. (ALJD at 4, Lns. 5-6; G.C. Ex. 1-k).

Four days after the election, Local 713 filed a charge in Case No. 2-CA-39193 alleging that since on or about February 24, 2009, the Employer had refused, and continued to refuse, to negotiate with Local 713 for an initial contract. (G.C. Ex. 1-g). On May 29, 2009, the Region issued a complaint on these allegations. (G.C. Ex. 1-n). The Employer filed a Response to the Unfair Labor Practice Charge dated June 4, 2009, denying the allegations. (G.C. Ex. 1-p).

On May 28, 2009, the two-member Board issued an Order denying Respondent's requests for review of the D&DE and Supplemental Decision without prejudice to a party's right to file objections concerning the issues raised on review. (ALJD at 4, Lns. 7-14; G.C. Ex. 1-m).

On June 2, 2009, the Region informed the parties that pursuant to the Board's Order the ballots would be opened and counted on June 5, 2009. (ALJD at 4, Lns. 16-17). The tally of ballots showed that of 55 eligible voters, 24 votes were cast for TWU Local 100, 5 votes were cast for Local 713, 9 votes were cast for no union, and there were 12 challenged ballots, sufficient to affect the results of the election. (G.C. Ex. 1-q). On June 10, 2009, both Employer and Local 713 filed objections to the election based in part on the same conduct alleged in Case 2-CA-39193 and the Employer's Request for Review.

(ALJD at 4, Lns. 25-46; G.C. Ex.s 1-r and 1-s). On July 10, 2009, the Regional Director issued an Order Approving Stipulation on Challenges and Revised Tally of Ballots. The revised tally showed that of 52 eligible voters, 24 votes were cast for TWU Local 100, 5 were cast for Local 713, 9 were cast for no union, with 9 challenged ballots, not sufficient to affect the results of the election. (ALJD at 4, Lns. 20-24; G.C. Ex. 1-t). The Regional Director found that a majority of valid votes had been cast for the Petitioner. (G.C. Ex. 1-t at 2).

On May 8, 2009, TWU Local 100 filed new unfair labor practice charges against the Employer in Case 2-CA-39337, alleging that the Employer violated Section 8(a)(1) and (2) by recognizing Local 713 at a time when Local 713 did not represent an uncoerced majority of a representative complement of unit employee. The charge also alleged various Section 8(a)(1) and (3) violations.

On February 19, 2010, the Office of the General Counsel, Division of Advice, issued a memo in Columbus Transit LCC, 2-CA-39337 ("Advice Memo"), regarding the issue of whether a notice filed pursuant to *Dana Corp.*, 351 NLRB 434 (2007), constituted constructive notice to a third-party union of an Employer's recognition of another union, such that the third-party union's Section 8(a)(2) charge filed more than six months after the recognition was time-barred under Section 10(b). Without addressing this issue, Associate General Counsel Barry J. Kearney concluded that the Regional should dismiss the reinstated 8(a)(2) charge in Case 2-CA-39337 on other grounds. (Advice Memo at 1, 3, & 5 appended hereto). The Region subsequently dismissed the 8(a)(2) allegations in a letter dated March 21, 2010.

On June 11, 2010, the Regional Director issued a Notice of Hearing on Objections and Order Consolidating Cases in Case Nos. 2-RC-23351, 2-CA-39193 and 2-CA-39337. (G.C. Ex. 1-cc). The Employer filed a Motion to Sever on June 29, 2010. On July 14, 2010, the Associate Chief Administrative Law Judge granted the Employer's Motion to Sever and it was ordered that case 2-CA-39337 would be tried separately. (G.C. Ex. 1-ff). TWU Local 100 later withdrew the remaining 8(a)(1) and (3) allegations in Case 2-CA-39337. (ALJD at 3, Lns. 2-4). The Region approved the withdrawal of these charges on August 5, 2009, and dismissed the complaint. (ALJD at 3, Lns. 4-7).

On July 12, 2010, the Employer filed a Motion to Reconsider Respondent's Requests for Review of the DDE and Supplemental Decision and Vacate the Board's Order in Case No. 2-RC-23351. (G.C. Ex. 1-ee). TWU Local 100 filed its opposition to the Employer's motion to vacate on August 9, 2010. (G.C. Ex. 1-kk).

On August 10, 2010, the Employer filed a motion to postpone the hearing indefinitely pending the Board's decision on the Employer's request for reconsideration and to vacate decision. (G.C. ex 1-ll). On August 13, 2010, Counsel for the Acting General Counsel opposed the Employer's motion (G.C. ex. 1-mm) and on August 16, 2010, TWU Local 100 filed its opposition to Employer's motion. (G.C. Ex. 1-nn). On August 16, 2010, the Associate Chief Administrative Law Judge denied Employer's Request to Postpone the Hearing Indefinitely. (G.C. Ex. 1-oo).

On August 18, 2010, TWU Local 100 filed a Motion to Intervene as an interested party in Case CA-39193 to ALJ Raymond Green. At the hearing on August 24, 2010, the ALJ formally allowed TWU Local 100 to intervene in 2-CA-39193. (T. at 9).[3]

[3] T. followed by a number refers to the page in the transcript of the hearing.

On September 13, 2010 the Employer filed a request to suspend the hearing indefinitely based on the Board's decision to reconsider its holding in *Dana* (Appended hereto). On September 14, 2010, the ALJ denied the Employer's request to suspend the hearing. (Appended). On September 15, 2010, the Board issued an Order denying the Employer's Requests for Review and denying the Employer's motion to vacate its May 29, 2009 Order on the grounds that the Employer's arguments could be resolved in the ongoing objections case herein. (Appended).

THE OBJECTIONS

On June 10, 2009, the Employer and Local 713 filed objections to the election herein. Many of the objections were the subject of the Employer's requests for review of the DDE and Supplemental decision. (ALJD at 4, Lns. 25-46; G.C. Ex. 1-e). The Employer and Local 713 also alleged that the Regional Director's DDE impacted the outcome of the election and was prejudicial to the Local 713, that the Employer's refusal to bargain with TWU Local 100 alleged in Case 2-CA-39193 affected the outcome of the election, that the 2-person Board had no authority to issue its May 28, 2009 Order, that TWU Local 100 promised and gave benefits to employees, including promises to obtain jobs for employees, that TWU Local 100 restrained and coerced employees by photographing and videotaping them, and that TWU Local 100 engaged in conduct to restrain and coerce Columbus and its employees by trespassing and picketing Columbus.

A hearing on the objections was held on August 24, 2010 before ALJ Raymond Green. At the hearing, the Employer called one witness in support of its objections, Willie Colon. Willie Colon is an organizer at Local 713 and at the time of the election was an organizer for TWU Local 100. (T. at 32-33). Local 713 failed to call any

witnesses. Local 100 called one witness in opposition to the objections, Dylan Valle, and introduced several documents into evidence. Dylan Valle is an employee of TWU Local 100 and was an organizer at the time of the election. (T. at 80). The ALJ subsequently dismissed all the objections filed by the Employer and Local 713. The ALJ also dismissed the 8(a)(5) charge filed against Columbus. Both Employer and Local 713 filed exceptions to the ALJ's decision and conclusions of law.

THE ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT ARE SUPPORTED BY THE RECORD EVIDENCE AND EXISTING BOARD LAW

A Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.*, 841 F.2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987). The burden is on the objecting party to prove its case and, thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it materially affected the results of the election. *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 999 (11th Cir. 1982); *Lamar Advertising of Janseville,* 340 NLRB 979 (2003). It is also the objecting party's burden to show that the conduct occurred during the critical period, that is, between December 22, 2008 and March 6, 2009. *Accubuilt Inc.,* 340 NLRB 1337 (2003). As argued below, neither the Employer nor Local 713 met its burden, and therefore, the Administrative Law Judge correctly overruled the objections.

ARGUMENT

POINT I: THE ALJ CORRECTLY CONCLUDED THAT TWU LOCAL 100 DID NOT PROMISE BENEFITS AND GUARANTEE JOBS TO EMPLOYEES

Employer Exception 8: "The statement on page 5, lines 9-10 that Willie Colon is "an interested witness with an ax to grind against Local 100."

Employer Exception 9: "The statements on page 5, lines 12-14 that Willie Colon testified that during the campaign, he told employees on various occasions that if they became members of Local 100 they would get preference for a jobs program that might be set up by the Metropolitan Transit Authority ("MTA") in conjunction with that Union."

Employer Exception 10: "The Statement on page 5, lines 24-27 that Dylan Valle credibly denied that he or any other representative from Local 100 said to the drivers that if they joined Local 100 that they would [get] "preferential hearing opportunities."

Employer Exception 11: "The ALJ's failure to find that Local 100 promised benefits by telling employees that they would receive preferential treatment and first "dibs" to become part of Pilot Program, which was a higher paying job, if they become Local 100 members as well as the ALJ's failure to find that this conduct constituted objectionable conduct."

Local 713 Exception 4: "The ALJ's statements that Willie Colon testified that during the campaign, he told employees at various times that if they became members of Local 100 they would get a preference for a jobs program that might be set up by the Metropolitan Transit Authority ("MTA") in conjunction with that Union."

Local 713 Exception 5: "The ALJ's statement that Dylan Valle credibly denied that either he or any other representative from Local 100 told the drivers that if they joined Local 100 they would get "preferential hiring opportunities."

Local 713 Exception 6: "The ALJ's noting that the pilot program was never implemented."

Local 713 Exception 7: "The ALJ's failure to find that Local 100 promised benefits to employees by communicating to them that they would receive preferential treatment and "first dibs" on limited, higher-paying pilot program jobs if they became Local 100 members."

Local 713 Exception 8: "The ALJ's failure to find that the conduct described in Exception 7 constituted objectionable conduct."

The ALJ correctly determined that TWU Local 100 did not promise jobs and other benefits to employees. (ALJD at 5, Lns. 30-34). Neither Local 713 nor the Employer could produce any evidence that TWU Local 100 promised jobs to employees.

Based on the record evidence and observation of witnesses, the ALJ correctly determined that Dylan Valle's testimony was credible and that Willie Colon was not a credible witness. (ALJD at 5, Lns. 8-9). The Board will not overturn an administrative law judge's credibility findings unless the clear preponderance of all relevant evidence convinces the Board that the findings are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). It is quite clear that a hearing officer is "uniquely well-placed to draw conclusions about credibility when testimony [is] in conflict," and is "also far better situated than are [the Board] to draw conclusions about a matter as ephemeral as the emotional climate of the [workplace] at the time of the election." *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C.Cir.1984). Thus, a hearing officer's "credibility determinations may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible." *Id.* (internal quotation omitted).

In determining that Mr. Colon was not credible and was an interested witness, ALJ Green considered the fact that Mr. Colon was discharged by Local 100 and became an organizer for Local 713 several months after the election herein. (ALJD at 5, Lns 8-9; T. at 51-52). ALJ Green correctly concluded that since the Employer failed to produce any employees to corroborate Mr. Colon's testimony and there was no documentary evidence to support his claims, Mr. Colon was not credible. (ALJD at 5) (T. at 50-52; 59; 94-95 for support for specific factual findings of the ALJ).

As Dylan Valle testified at the hearing, the only testimony regarding jobs related to the MTA's "Pilot Program." The Pilot Program was a plan to create a quasi-public

paratransit[4] depot run by the MTA in an effort to cut costs. Under the plan, laid off American Transit (a private paratransit company) drivers what were pre-screened and qualified, would become drivers at the pilot program depot run by the MTA. (ALJD at 5, Lns. T. at 97-101). The MTA had a previous contract with American Transit and TWU Local 100 represented the paratransit drivers there. (T. at 99). When the MTA did not renew their contract with American Transit, American Transit shut down displacing more than 350 drivers. (T. at 99-100).

Mr. Valle testified that as a result, the former president of TWU Local 100, Roger Toussaint, met with the MTA to negotiate an agreement to protect laid-off American Transit drivers and later informed the drivers that they would be given preferential treatment to the Pilot Program jobs. (T. at 102). The Pilot Program negotiations between the MTA and TWU Local 100 took place in September 2008, outside the critical period (T. at 99). Toussaint instructed the American Transit drivers to prepare resumes for the pilot program submission to the MTA. (T. at 102). TWU Local 100 organizers collected over 310 resumes and presented them to then TWU Local 100 President Roger Toussaint for eventual submission to the MTA.

The Record accurately reflects that TWU Local 100 made no promises that Columbus drivers would be guaranteed jobs under the Pilot Program. (T. at 64, 105). Some of the former American Transit drivers that worked at the Columbus depot raised the issue about the Pilot Program with Dylan Valle. (T. at 102). In fact, only seven former American Transit drivers who were working at Columbus were eligible for the program (T. at 105). Both Mr. Colon and Mr. Valle testified that Columbus employees were told

[4] Paratransit is an industry that provides transportation to people with disabilities. (T. at 106).

that only laid off American Transit drivers would be eligible. (T. at 63, 105). More significantly, Dylan Valle testified the Pilot Program was never implemented (T. at 65).

Because the neither the Employer nor Local 713 could produce any evidence to show that TWU made objectionable promises to employees and because Dylan Valle credibly testified there were no promises of jobs to employees, the ALJ was correct in dismissing the objections.

POINT II: THE ALJ CORRECTLY CONCLUDED THAT TWU LOCAL 100 DID NOT TAKE PHOTOGRAPHS OF EMPLOYEES ON THE DAY OF THE ELECTION

Employer Exception 12: "The statement on page 5, line[s] 47 that Valle testified that he never saw Colon taking any pictures on the day of the election."

Employer Exception 14: "The statement on page 6, lines 1-3 that the ALJ did not credit Colon's testimony about taking photographs on the day of the election or any other day in the absence of any employee's testimony."

Employer Exception 15: "The statement on page 6, line 3 by the ALJ that he was overruling the objection regarding the picture taking."

Employer Exception 16: "The statements on page 6, footnote 5 lines 45-49 by the ALJ that assuming Colon used his cell phone to take pictures, from the distance Colon took the pictures it would not be readily apparent to employees if they were 100 feet across the street and the ALJ had doubts that any employee would have noticed Colon taking the picture and would have been intimidated by the picture taking."

Local 713 Exception 9: "The ALJ's statement that Valle testified he never saw Willie Colon take pictures on the day of the election."

Local 713 Exception 11: "The ALJ's statements that even assuming Colon used his cell phone to take photographs, that would not be readily apparent to employees if they were 100 feet away and across the street, and that the ALJ doubted an employee would have noticed Colon was taking a picture, and therefore would not be intimidated by it."

The ALJ was correct in overruling the objection regarding Local 100 taking photographs. (ALJD at. 6, Lns., 1-3). The Record accurately supports the ALJ's decision

to not credit Willie Colon's testimony and considered the Employer's failure to produce any employee to corroborate Mr. Colon's accusations. Dylan Valle credibly testified that no TWU Local 100 staff members took photographs on the day of the election. (T. at 96).

The ALJ correctly determined that even if Colon used his cell phone to take photographs, that would not be readily apparent to employees if they were 100 feet away and across the street. (ALJD at 6. Lns. 45-47). As the Record accurately reflects, Willie Colon testified that he took photographs with his cell phone on the day of the election of people standing near the entrance to the election site. (T. at 36). At the time, Mr. Colon was standing outside of the Employer's gate, about 100 feet from the entrance of the voting site. Mr. Colon also testified that he saw people look over their shoulders when he was taking pictures with his cell phone, but he was not sure what, if anything was said. (T. at 37). Under the circumstances, the ALJ was correct in overruling the objection because Colon could not possibly ascertain whether or not those employees felt threatened or intimidated.

The Employer and Local 713 also contend that TWU Local 100 took pictures of employees prior to the election. However, neither the Employer nor Local 713 produced any pictures or employees to substantiate their claim. Furthermore, neither the Employer nor Local 713 produced any evidence to show that the photographs taken before the election had an impact on the election.

In *Nu Skin International,* 307 NLRB 223 (1992), the Board held that a union photographing employees attending the union's picnic luncheon was not objectionable. Here, neither the Employer, nor the Local 713 produced any photographs of employees taken at any time during the critical period. In addition, Colon was not credible,

providing contradictory testimony on direct and cross-examination. Even if photographs were taken on the day of the election, Mr. Colon was too far away to hear what any worker said and no employees testified to corroborate Mr. Colon's testimony. In essence, the ALJ was correct in determining that the Employer has failed to show that the alleged photographs intimidated employees or otherwise had any impact on the results of the election. Under these circumstances, the ALJ correctly dismissed the objection.

POINT III: THE ALJ'S DETERMINATION THAT THE REGIONAL DIRECTOR WAS CORRECT IN PROCEEDING WITH THE ELECTION DESPITE THE EMPLOYER'S RECOGNITION AGREEMENT WITH LOCAL 713 WAS BASED ON CURRENT LAW

Employer Exception #2: The failure of the ALJ's failure to state on page 3, lines 20-21 that Columbus also claimed that the recognition of Local 713 barred the petition.

Employer Exception #19: The ALJ's statement on page 6, lines 19-20 that the D&DE was issued upon the rationale of *Dana Corp.*, 351 NLRB 434 (2007).

Employer Exception #20: The statements on page 6, lines 20-23 that a recognition agreement barred Local 100's petition.

The ALJ was following Board precedent when he determined that the Regional Director was correct in proceeding with the election, despite the existence of a recognition agreement with Local 713. (ALJD at 3, Lns. 28-30). As the Employer conceded, under *Dana,* its recognition of Local 713 does not create a bar to processing the election petition in this case. "The Board held that if another union files a petition within forty-five (45) days, the union's petition will be processed because the recognition will not be found to be a bar to an election." (G.C. Ex. 1-e at 7).

The ALJ's decision that the the Regional Director's decision to proceed with the election despite the Employer's recognition agreement is consistent with the Board's decision in *Dana*, 351 NLRB 434 (2007). In *Dana,* the Board held that,

> [i]n order to achieve a 'finer balance' of interests that better protects employees' free choice, we herein modify the Board's recognition bar doctrine and hold that no election bar will be imposed after a card-based recognition unless...45 days pass from the date of notice without the filing of a valid petition...If a valid petition...is filed within 45 days of the notice, the petition will be processed. *Id.*

It is uncontested that TWU Local 100 filed its representation petition within 45 days after the notice posting period began on November 17, 2008; even the Employer conceded as much. (G.C. Ex. 1-e at 2). Therefore, the ALJ was following Board precedent and was correct in overruling the Employer's exceptions.

The Employer urges the Board to overturn *Dana.* (Employer's Brief at p. 14, 26-28)[5]. Assuming that the Board would overturn *Dana*, the Board should apply its decision prospectively. The Board has a history of prospective application of decisions which significantly depart from preexisting rule of law. In fact, the Board succinctly summarized this area of law when it issued the decision in *Dana*

> The Board's general practice is to apply policies and standards to all pending cases in whatever stage. However, the Board will make an exception in cases where retroactive application could, on balance, produce a result which is contrary to a statutory design or to legal and equitable principles....Moreover, although retroactive application would further employee free choice, it would destabilize established bargaining relationships. Thus retroactivity would produce mixed results in accomplishing the purposes of the Act, while the reliance interests of the parties and those similarly situated would be unequivocally and substantially frustrated.

351 at. 443-44. In *Levitz Furniture Co. of the Pacific, Inc.,* the Board ruled that "employers may withdraw recognition unilaterally only by showing that unions have actually lost majority of support" and had to "decide whether to apply the new rule retroactively, *i.e.*, in all pending cases, or only prospectively." 333 NLRB 717, 729 (2001). As in *Dana,* the Board in *Levitz* cited the standard: "[t]he propriety of retroactive

[5] Employer's Brief with following page number refers to the Employer's Brief in Support of its Exceptions.

application...is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." The Board further reasoned that:

> In our view, the Respondent and other similarly situated employers did not leave adequate warning that the Board was about to change its standard for withdrawing recognition at the time of the events in the pending cases. Therefore, we shall decide all pending cases involving withdrawals of recognition under existing law.

Levitz Furniture Co. of the Pacific, Inc. 333 NLRB 717, 729 (2001).

In the instant case, the parties have relied on the *Dana* rule throughout the election process. Consistent with this reasoning, if the Board overrules *Dana*, it should also apply its decision prospectively. To do otherwise would undermine employee free choice by invalidating elections held pursuant to *Dana* and destabilize collective bargaining relationships as well.

POINT IV: THE ALJ'S FINDING THAT THE REGIONAL DIRECTOR WAS CORRECT IN PROCEEDING WITH THE ELECTION DESPITE A PENDNG 8(a)(2) CHARGE IS BASED ON CURRENT BOARD LAW

Employer Exception #3: The Regional Director should not have proceeded with the election while the petitioner, Local 100, had an 8(a)(2) charge pending alleging unlawful recognition and assistance by the Company of Local 713, Local 713.

Employer Exception #22: The statements on page 6, lines 29-34 that the Regional Director's determination in the D&DE that if Local 713 won the election its status would be held in abeyance pending the resolution of the 8(a)(2) allegation "accurately" reflects the governing legal procedure and that there is no basis to overturn the election because the Regional Director's D&DE followed this "legal procedure governing the case at the time."

The ALJ was following Board precedent when he determined that the Regional Director was correct in proceeding with the election. The Employer and Local 713 contend that the Regional Director should not have proceeded to election while 8(a)(2) charges were pending. The Regional Director issued the D&DE on March 4, 2009. The

D&DE correctly found that *Dana* overruled the line of cases that an election should be blocked due to pending charges. As cited by the Regional Director, substantial authority existed even pre-*Dana* for proceeding to an election notwithstanding the pendency of 8(a)(2) charges. (*See, e.g.*, *Michigan Bell*, 63 NLRB 941 (1945) and *Columbia Pictures*, 81 NLRB 1313 (1949); G.C. Ex. 1-c p.4). The Regional Director explained that:

> the primary rationale for blocking an election is that a determination on whether a recognition bar exists depends on the resolution of the unfair labor practice allegations which are not properly litigable in a representation proceeding

Thus, because *Dana* overruled the principles of the recognition bar doctrine to create a 45-day window period, the ALJ was correct in determining that the election rightfully proceeded. (G.C. Ex. 1-c p. 4).

The Board specifically held in *Dana* that employee free choice outweighs concerns about the stability of bargaining relationships such as those raised by the Employer. *Dana*, 351 NLRB at 434. The concerns of stability of bargaining relations are even less compelling here, where there was a substantive allegation of unlawful assistance by the Employer in the establishment of that relationship, than they were in *Dana.* To permit the pendency of the 8(a)(2) charges to delay or deny the employees' right to an election at Columbus Transit would have permitted the Employer to gain from its alleged unlawful conduct by thwarting the employees' legitimate "exercise of their choice on collective bargaining representation through the preferred method of a Board-conducted election." *Dana,* 351 NLRB at 434. Therefore, the Board should sustain the ALJ's decision.

As stated above, even if the Board disagrees with the ALJ's decision to sustain the Regional Director's findings that *Dana* partially overruled prior precedent that held

that the election may be blocked due to pending 8(a)(2) charges, the Board should not overturn the election. To do so would disenfranchise employees who voted to be represented by TWU Local 100 and would reward the Employer for its allegedly unlawful assistance to Local 713.

POINT V: THE ALJ FOLLOWED BOARD PRECEDENT WHEN DECIDING THAT A CARLSON WAIVER IS NOT NECESSARY BECAUSE THERE WAS NOT A CONTRACT BAR

Employer Exception #4: The Regional Director should not have proceeded with the election while said 8(a)(2) was pending without obtaining a *Carlson* waiver.

Employer Exception #24: The statements on page 6, lines 36-41 and page 7, lines 1-2 that the proceeding to an election while an 8(a)(2) is pending is a "procedural question inextricably tied to the *Dana* rationale," that since "*Dana* is the current law that this issue should be addressed to the Board," and that the proceeding to an election while the 8(a)(2) was pending is not a basis for setting aside the election.

The ALJ's determination that the Regional Director correctly proceeded with the election despite not having a *Carlson* waiver is grounded in applicable law. The Employer again takes exception with the ALJ's decision to follow Board precedent. Contrary to the Employer, the *Carlson Furniture Industries*, 157 NLRB 851 (1966) case directly premises the requirement of a waiver on the existence of a recognition or contract bar, not present here.

As the Employer concedes, under *Dana*, its recognition of Local 713 does not create a bar to processing the election petition in this case:

> The Board . . . held that if another union files a petition within forty-five (45) days, the union's petition will be processed because the recognition will not be found to be a bar to an election. (G.C. Ex. 1-e at 7).

The existence of potential recognition or contract bars was precisely the reason the Board obtained waivers of 8(a)(2) enforcement prior to processing petitions in *Carlson*, and the cases that followed it.

Thus, contrary to the Employer, in the pre-*Dana Carlson Furniture* line of cases the Board's rationale for completing the processing of 8(a)(2) allegations before holding an election unless it received a waiver from the Petitioner was that if the Employer did not violate 8(a)(2), a contract or other bar would prevent an election. *See, e.g.*, *Mistletoe Express Service*, 268 NLRB 1245, 1247 (1984) ("[t]he existing contract between the employer and intervenor may constitute a bar to the representation case proceeding unless the parties have engaged in conduct violative of Section 8(a)(1) and (2) and Section 8(b)(1)(A) of the Act"); *Town & Country*, 194 NLRB 1135, 1136 (1972) (". . . the contract between the employer and intervenor constitutes a bar to this proceeding unless the employer's recognition of intervenor . . . was itself . . . in violation of Section 8(a)(2) . . ."); *Carlson Furniture Industries*, 157 NLRB 851, 853 (1966). In fact, in *Town & Country*, *supra*, the Board specifically found that, in "each" of the "cases in which the Board has conducted an election despite the pendency of charges which normally 'block' such an action . . . the contract was removed as a bar." 194 NLRB at 1135. Thus, in each of the *Carlson Furniture* line of cases, it was the existence of a potential contract or recognition bar which prevented the Board from processing a petition unless the petitioning union waived enforcement of 8(a)(2). Here, there is no recognition bar, as the Employer concedes, so no waiver is necessary.

The Employer simply misapprehends the rationale for the *Carlson* decision. There, "the Employer and Intervenor contend[ed] that their . . .collective bargaining

agreement constitutes a bar to the instant petition. . .," 157 NLRB at 852. The Board found that "an agreement entered into in violation of section 8(a)(2) of the Act is not a bar to a petition." *Id.* However, the Employer had "informed the Board that it [did] not intend to comply with the Board's order" that the Board had issued upon finding that the Employer had violated 8(a)(2). *Id.* at 853. Thus, the reason a waiver was sought and obtained in that case was that there was still a chance that the Court of Appeals could overturn the 8(a)(2) determination, which would have reinstated the contract bar to an election. Under those circumstances, the Board was understandably reluctant to process the petition. *Id.* So the petitioning union in *Carlson*, in order to proceed promptly to an election without having to wait for the Court of Appeals to rule on the 8(a)(2) issue to learn whether or not a contract bar existed, agreed that if the Intervenor won the election and was certified, no further action would be taken to enforce the Board's 8(a)(2) findings. *Id.* Thus, the purpose of the waiver was to obviate the need for a final determination whether the 8(a)(2) conduct lifted the contract bar before proceeding to an election.[6]

In short, *Dana*'s removal of the recognition and contract bars to an election in this matter also removes the rationale for a *Carlson*-type waiver.[7] As the Regional Director points out in the D&DE, this reading of the cases is consistent with the view stated in the

[6] Indeed, the Board found that "the Employer's violation of Section 8(a)(2) is related at least in part to the unresolved question concerning representation" because as long as there was still a possibility that the Court of Appeals could overturn the 8(a)(2) finding, there was still a possibility that a contract bar to an election could be raised. *Id.* at 853. Thus, contrary to the Employer, the existence of a recognition or contract bar is the sense in which an 8(a)(2) charge affects the issue of representation in *Carlson* and related cases.

[7] No basis can be found in any of the cases for the Employer's circular argument that "the predicate for requiring a waiver is whether the petitioning union seeks to proceed with the 8(a)(2) charge." This is simply a restatement of the Employer's wish to be able to deny employees their right to an election simply by entering into an 8(a)(2) agreement. As analysis of *Carlson* and its progeny makes clear, where there is no recognition or contract bar, there is no basis for an Employer to extract the effective withdrawal of an 8(a)(2) charge as the *quid pro quo* for employee exercise of rights already extended by *Dana*.

Casehandling Manual that the blocking charge policy is not a *per se* rule; rather, "it is premised solely on the Agency's intention to protect the free choice of employees in the election process." (G.C. Ex. 1-c, NLRB Casehandling Manual § 11730). Based on the above the ALJ's decision to overrule the objections regarding the *Carlson* waiver should be sustained.

The Employer's speculative concern about the post-election stability and status of its relationship with Local 713 does not outweigh the fundamental purpose of the Act to protect the employees' right to freely choose their bargaining representative. (Employer's Brief at 25). The Board specifically held in *Dana* that employee free choice outweighs concerns about the stability of bargaining relationships such as that raised by the employer. *Id.*, at 442. To permit the pendency of the 8(a)(2) charges to delay or deny the employees' right to an election at Columbus Transit would be to permit the Employer to gain from its unlawful conduct by thwarting the employees' legitimate exercise of the franchise. Thus, contrary to the Employer's position, the fact that this petition was filed after *Dana* makes all the difference in terms of whether to require a *Carlson* waiver before proceeding with an election. It is not for the Employer to decide whether or when employees may exercise their Section 7 rights.

As the ALJ aptly stated, the Employer is arguing that the employees' interest in having their own choice in selecting a bargaining representative would be better served by postponing the election for an indefinite period of time, while an unfair labor practice charge alleging unlawful assistance to Local 713 wends its way through the prolonged procedure required to determine unfair labor practice allegations. (ALJD at 7, Lns. 8-13).

POINT VI: THE ALJ'S FINDING THAT THE REGIONAL DIRECTOR WAS CORRECT IN PROCEEDING WITH THE ELECTION WAS GROUNDED IN CASE LAW

Employer Exception 4[8]: "The Regional Director's determination in the D&DE that Local 100 could be certified if Local 100 won the election while if Local 713 won the election Local 713's certification would be held in abeyance pending the resolution of said 8(a)(2) charge filed by Local 100 precluded a fair and valid election.

Local 713 Exception 1: "The ALJ's failure to state that the Regional Director's D&DE stated that if Local 713 won the election, its certification would be held in abeyance pending the resolution of the 8(a)(2) charges filed by Local 100."

Local 713 Exception 12: "The ALJ's failure to find that the Regional Director's determination that if Local 713 won the election, its certification would be held in abeyance pending the resolution of the 8(a)(2) charges filed by Local 100, while if Local 100 won the election, Local 100 could be certified as a basis for overturning the election."

The ALJ's finding that Regional Director's decision to proceed with the election was based on Board precedent. The Employer raised speculative concerns about potentially being required to bargain with Local 713, if Local 713 won the election, was certified and then could potentially be "disestablished" if the 8(a)(2) charges were ultimately found to have merit. (G.C. Ex. 1-e). The Employer repeated this assertion several times in its Exceptions, notwithstanding that, in response to the concerns raised by the Employer, the DDE specifically directed that

> [c]ertification will be held in abeyance pending completion of the unfair labor practice proceeding should Intervenor win the election, alleviating the "untenable position" of which the Employer complains—that meaningful bargaining is not possible where the relationship with Intervenor could be disestablished as the remedy of the pending unfair labor practice charge.

(G.C. Ex. 1-c, at 5).

[8] The Employer's Exceptions contained two #4s. This exception addresses the second #4.

Neither Local 713 nor the Employer presented any credible evidence at the hearing to support its argument that the Regional Director's determination precluded a fair and valid election and/or prejudiced Local 713. There is simply no basis for the Employer's repeated conjuring of the specter that,

> [a]bsent a *Carlson* type waiver the issue of the Company's recognition...of Local 713 would remain even after the vote and potentially even after the certification of the election...Theoretically, the disestablishment of Local 713 could happen even after the certification of the results of the election...Despite the results of the election and even a certification, the Company could be placed in the position of being required to bargain with a union when the issue of the recognition of that union might still be uncertain.

(G.C. Ex. 1-e, at 9-10). The D&DE creates no such uncertainty; it is simply a restatement of Board law. Further, TWU Local 100's withdrawal of the 8(a)(2) charges on March 12, 2009 and the Acting Regional Director's Supplemental Decision removed this as an issue.

The ALJ correctly stated that the Employer is arguing that the employees' interest in having their own choice in selecting a bargaining unit representative would be better served by postponing the election for an indefinite period of time. (ALJD at 7, Lns. 8-11).

POINT VII: THE ALJ'S CORRECTLY DETERMINED THAT THERE WAS NO IMPACT ON THE ELECTION FROM THE D&DE

The ALJ was correct to overrule the Employer's and Local 713's objections regarding the D&DE's impact on the election. Neither the Employer nor Local 713 produced any evidence that the D&DE impacted the election.

The ALJ correctly credited Dylan Valle's testimony. Mr. Valle testified that he never discussed the D&DE nor showed the D&DE to any workers and that he was not

aware of any other organizer showing the document to other workers. (T. at 97-98). The TWU Local 100 organizers at Columbus Transit were Willie Colon, Ralph Brown and Dylan Valle. (T. at 96). They were specifically instructed not to distribute the document or to discuss the document as it would be confusing to employees. (T. at 96). TWU Local 100 counsel Dean Hubbard instructed them not to show the document because: 1) the drivers may not understand the document and 2) it was not a definitive action. (T. at 96-97). On cross examination, Mr. Colon admitted he was told "not to distribute" the alleged document, but "wasn't told not to show it." (T. at 60-61).

The ALJ discredited Willie Colon's testimony and the record reflects Mr. Colon's contradictory testimony. Mr. Colon was unable to identify which document he allegedly showed to employees. Mr. Colon claimed that it was an "NLRB decision" that stated if Local 713 won the election it would not immediately be certified but if TWU Local 100 won the election certification would take immediate effect. (T. at 33-34). However, when shown the DDE, Mr. Colon testified that it was not the document that he showed to employees. (T. at 57). Colon also testified that the Employees were not shown the Supplemental Decision and Order. (T. at 58). Willie Colon insisted that the document he showed to employees was a 14 page NLRB document. However, Mr. Colon did not produce any documents that he allegedly showed to employees. At the hearing, when Counsel for the General Counsel reviewed the record he found no 14 page NLRB document in the record.

Assuming *arguendo,* that Willie Colon did show bargaining unit employees a document that implied that certification would be delayed if Local 713 won the election, he was acting outside the scope of his authority. Colon admitted that he ignored the

directive of TWU Local 100 counsel to refrain from discussing or distributing the DDE. (T. at 96). Because there is no evidence that a document was in fact shown to employees and because there was no evidence that the document had an impact on the election, the ALJ's decision to overrule the Employer's and Local 713's objections was correct.

POINT VIII: THE ALJ WAS CORRECT IN OVERRULING LOCAL 713's 8(a)(5) CHARGE

The ALJ's decision to dismiss Local 713's 8(a)(5) charge alleging the Employer refused to bargain with Local 713 is based on the Record and well grounded in case law. The ALJ was correct in determining that a reasonable time had passed for the parties to bargain. The Board has consistently held that in cases involving voluntary recognition, the party is required to bargain for a reasonable time after the granting of recognition. There is no arithmetical standard as to what constitutes a reasonable amount of time. *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987). (ALJD at. 7, Lns. 39-41). On November 10, 2008, the Employer granted voluntary recognition to Local 713 as the representative of all full-time and regular part-time drivers employed at Columbus. (G.C. Ex. 1-p, G.C. Ex. 2). On December 22, 2008, TWU Local 100 filed a petition for election in the above-described unit pursuant to a *Dana* notice posted by Respondent. (G.C. Ex. 1-a). Pursuant to the D&DE, the Region ordered a secret ballot election to be held on March 6, 2009. (G.C. Ex. 1-c). By later dated February 24, 2009, addressed to Harry Rodriguez, Employer's agent, Local 713 Business agent Randy Lang requested that Employer meet with Local 713 to negotiate a collective bargaining agreement covering the unit. (G.C. Ex. 2; G.C. Ex. 3). By letter dated March 4, 2009, Angel R. Roda, Employer's admitted agent, wrote to Local 713 stating that Employer declines Local 713's request to bargain. (G.C. Ex. 1p; G.C. Ex. 2; G.C. Ex. 4).

The Record clearly establishes that Local 713 did nothing to bargain with the Employer until after TWU Local 100 filed its Petition. Because, Local 713 failed to request to bargain for a substantial period of time the ALJ was correct to determine that the Employer did not have a duty to bargain with Local 713. (ALJD at 8, Lns. 9-10).

For the Board to find that the Employer had a duty to bargain with Local 713, it must assume that an uncoerced majority of its workforce supported Local 713.[9] The Employer concedes that it entered into recognition with Local 713 before it purported to verify Local 713's majority status (G.C. Ex. 1-e at p. 5). Because there was no testimony on this, only stipulation, TWU Local 100 could not cross examine or elicit testimony on whether the parties met after the election and/or the Employer offered to meet with Local 713 or even the number of employees at the time of recognition. Even though TWU Local 100 was permitted to intervene in 2-CA-39193, its ability to participate in this aspect of the Hearing was extremely limited.

If the Board does find that the Employer violated Section 8(a)(1) and (5) of the Act, the appropriate remedy would be to order the Employer to bargain upon request with the bargaining representative chosen by a majority of employees in the appropriate unit.[10] It would be an anomaly to now order the Employer to bargain with Local 713, since the majority of employees voted for TWU Local 100 while only five voted for Local 713. (G.C. Ex. 1-t).

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[9] An employer has no duty to bargain with a union which it prematurely recognized at the time when the employer did not employ a substantial and representative complement of its projected workforce. *Elmhurst Care Center,* 345 NLRB 1176, 1177 (2005). According to the information possessed by the Division of Advice, Respondent recognized Local 713 at a time when there were only 11 employees in the unit herein, which grew to 52 employees by the time of the election. Accordingly, the Respondent did not employ a complement of 30% of its ultimate employee workforce at the time it granted Local 713 recognition, the recognition was unlawful, and, thus, there was no duty to bargain. (Appended).

[10] At the Hearing, Counsel for the Acting General Counsel did not recommend a remedy for the 8(a)(5) allegations.

CONCLUSION

Wherefore, the ALJ's decision was wholly supported by the record and well grounded in applicable law. For the above stated-reasons, TWU Local 100 respectfully requests the Board to overrule both Local 713's Exceptions and the Employer's Exceptions and adopt the ALJ's decision remanding the case to the Regional Director for certification.

Dated: New York, New York
January 7, 2011

Respectfully submitted,

Polly J. Halfkenny, Esq.
Jason R. Veny, Esq.
Attorneys for TWU Local 100
1700 Broadway, 2nd Floor
New York, New York 10019
(212) 873-6000 ext. 2010

Attachment A

GOLDBERG AND WEINBERGER LLP
Attorneys at Law
630 Third Avenue, 18th Floor
New York, New York 10017
TEL: (212) 867-9595
FAX: (212) 949-1857

Lewis Goldberg (N.Y., CT. & N.J.)
Stuart Weinberger (N.Y. & N.J.)

September 13, 2010

Facsimile Transmission
Administrative Law Judge Raymond Green
National Labor Relations Board
120 West 45th Street-11th Floor
New York, New York 10036

Regarding: Columbus Transit, LLC

Case Nos.: 2-CA-39193 and 2-RC-23351

Dear Judge Green:

Our firm represents Columbus Transit, LLC ("Employer" or "Columbus"). A hearing was held on August 24, 2010 in the above referenced case. The briefs are currently due on September 20, 2010. The Company requests that this case be suspended in light of the National Labor Relations Board's decision in Rite Aid Store #6473, 355 NLRB No. 157 (2010), that the Board will reconsider its holding in Dana Corp., 351 NLRB 434 (2007).

The Board's decision in Rite Aid Store #6743 will almost certainly have an impact on the election objections in this case. Clearly, the Employer's objections involve, in part, the Dana Corp. issues, including whether there was a recognition bar which precluded an election. The Board's decision in this matter also could potentially have an effect on the CA case as well. Columbus asserts that, at this point, it is not prudent to proceed in light of what the Board may decide in Rite Aid Store #6743.

Moreover, this letter is not an attempt to delay the matter or to re-argue Associate Chief Administrative Law Judge's decision not to grant an extension of time to submit the post-hearing brief. Rather, this letter is an attempt to avoid the parties spending time, effort and money on this case when the Board's decision could change the outcome of the case, including whether there should have been an election in this case.

In sum, the Employer requests that this case be suspended pending the Board's decision. A copy of the letter has been served by facsimile transmission on the parties listed below.

Very truly yours,

Stuart Weinberger

Stuart Weinberger

cc: Robert Guerra, Esq.
Polly Halfkenny, Esq.
Bryan McCarthy, Esq.

SW: ColumbusL.91310

Attachment B

TRANSPORT WORKERS UNION
OF GREATER NEW YORK • AFL-CIO • LOCAL 100

John Samuelsen *President* | **Israel Rivera, Jr.** *Secretary Treasurer* | **Benita Johnson** *Recording Secretary* | **Angel Giboyeaux** *Administrative VP*

September 15, 2010

By Facsimile to (212) 944-4904 and by E-Filing

Raymond Green, Administrative Law Judge
National Labor Relations Board
Division of Administrative Judges
120 West 45th Street
New York, NY 10036

Re: Columbus Transit and TWU Local 100 and Local 713 IUJAT
Case Nos. 2-RC-23351 and 2-CA-39193

Dear Judge Green:

Transport Workers Union of Greater New York, Local 100, AFL-CIO ("TWU Local 100") hereby submits its opposition to Columbus Transit's ("Columbus" or Employer") September 13, 2010-request to suspend the above-referenced case in light of the Board's decision in *Rite Aid Store #6473*, 355 NLRB No. 157 (2010) to reconsider its holding in *Dana Corp.* 351 NLRB 434 (2007).

The hearing on this case took place on August 25, 2010, with briefs due on September 20, 2010. The Employer now argues that the Board's decision in *Rite Aid Store #6473* will impact the objections herein, one of which involves the issue of whether a recognition bar precludes an election. The Administrative Law Judge should reject this argument. The Employer assumes that the Board will overrule *Dana* and, contrary to established precedent, will apply its decision retroactively.

The *Dana* Board addressed the issue of retroactivity directly. In so doing, it applied its decision prospectively, arguing that even if retroactive application would further employee free choice, it would destabilize established bargaining relationships and produce mixed results. 351 NLRB at 444, and fn. 41. Consistent with this reasoning, if the current Board overrules *Dana*, it would certainly apply its decision prospectively. To do otherwise would undermine employee free choice by invalidating elections held pursuant to *Dana* and destabilize collective bargaining relationships as well.

For all of the above-stated reasons and to avoid further delay in effectuating the rights of Columbus employees to be represented by a union of their choosing, the Union urges the Administrative Law Judge to deny the Employer's request to suspend this case pending the outcome of *Rite Aid Store #6473*.

Respectfully submitted,

Polly J. Halfkenny
TWU Staff Attorney

Cc: Robert Guerra, Esq.
Stuart Weinberger, Esq.
Bryan McCarthy, Esq.

Attachment C

United States Government

NATIONAL LABOR RELATIONS BOARD

Division of Judges

120 West 45th Street - 11th Floor

New York, New York 10036-5503

September 14, 2010

Goldberg and Weinberger LLP
630 Third Avenue, 18th Floor
New York, NY 10017
Attn: Stuart Weinberger Esq.

Re: Columbus Transit, LLC
Case Nos. 2-CA-3913 and 2-RC-23351

Dear Sir,

I understand your position regarding the potential impact on this case by the Board's decision to reconsider *Dana Corp.*, 351 NLRB 434 (2007). However, I do not agree that the matter should be postponed until the Board decides that matter. The facts in this case are not in serious dispute and there is, in my opinion, no reason why this case should not be decided now. Any decision made by me will not prejudice your right to argue your legal position before the Board. It will only put you closer in line to make that argument.

I also note that although you may assume or hope that the Board will overrule Dana, there are two other possible outcomes. The Board may decide to sustain Dana or alternatively, even if overruled, to not apply any "recognition bar rules" to cases where elections have already been held and the employees have had the opportunity to express their desires in a secret ballot election.

Very truly yours,

Joel P Biblowitz (for)

Raymond P. Green

Judge Green

CC:
Robert Guerra Esq.
Polly Halfkenny Esq.
Bryan McCarthy Esq.

Attachment D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLUMBUS TRANSIT LLC
Employer

and

Case 2-RC-23351

TRANSPORT WORKERS UNION OF
GREATER NEW YORK, LOCAL 100,
AFL-CIO
Petitioner

and

LOCAL 713, INTERNATIONAL
BROTHERHOOD OF TRADE UNIONS,
IUJAT
Intervenor

ORDER

On May 28, 2009, the two sitting members of the Board issued an Order denying review in this proceeding. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. On July 26, 2010, the Employer filed a motion to vacate the Board's May 28, 2009 Order denying the Employer's requests for review of the Regional Director's Decision and Direction of Election and the Acting Regional Director's Supplemental Decision and Order Directing the Opening and the Counting of Ballots. The Board has carefully considered the Employer's February 26, 2009 Request for Review, its April 3, 2009 Request for Review, and its current motion to vacate, and finds them without merit. Accordingly, we deny the earlier Requests for Review and deny the instant motion on the grounds that the Employer's arguments can be resolved in the ongoing objections case.

WILMA B. LIEBMAN, CHAIRMAN

CRAIG BECKER, MEMBER

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C., September 15, 2010.

CERTIFICATION OF SERVICE

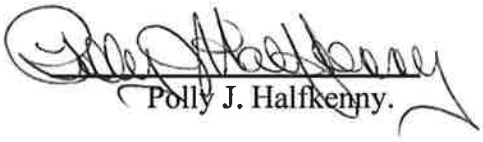
The foregoing Transport Workers Union of Greater New York, Local 100's Brief in Opposition to Exceptions and the documents appended thereto was e-filed and a copy electronically served on January 7, 2011 on the following counsel:

Robert Guerra, Esq. Counsel for the General Counsel: Robert.Guerra@nlrb.gov

Stuart Weinberger, Esq., Counsel for the Employer: STUART575@aol.com

Bryan McCarthy, Esq., Counsel for Local 713: bcm@ocmlawyers.com

Dated: New York, New York
January 7, 2011



Polly J. Halfkenny.